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No. [redacted]

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LARRY EUGENE EVANS,

PETITIONER,

v.

ELLIS C. MacDOUGALL, Director of Arizona Department of Corrections, and ROBERT ZORN, Warden of Cell Block Six, Arizona State Prison, Florence, Arizona,

RESPONDENTS,

and

THE ATTORNEY GENERAL OF THE STATE OF ARIZONA,

ADDITIONAL RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007

RANDALL J. KRIES
2715 N. 3rd St., Ste. 100
Phoenix, Arizona 85004

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

LARRY EUGENE EVANS,

PETITIONER,

v.

ELLIS C. MacDOUGALL, Director of Arizona Department of Corrections, and ROBERT ZORN, Warden of Cell Block Six, Arizona State Prison, Florence, Arizona,

RESPONDENTS,

and

THE ATTORNEY GENERAL OF THE STATE OF ARIZONA,

ADDITIONAL RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, LARRY EUGENE EVANS, by and through his attorney undersigned, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit abdicating its jurisdiction at the request of Respondent.

QUESTION PRESENTED FOR REVIEW

1. Can the State of Arizona, utilizing the doctrine of exhaustion of state remedies, require the federal courts to abdicate their jurisdiction which was validly invoked some ten months before the state court's determination in an unrelated case?

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered its order granting the motion of the State of Arizona to remand this matter and to dismiss Petitioner's appeal on June 2, 1982. A copy of the court's written order is attached hereto as Appendix "A".

Petitioner's request for reconsideration, vacation of order of dismissal, was denied by order of the court filed June 28, 1982. A copy of the order is attached as Appendix "B".

JURISDICTION

The jurisdiction of this Honorable Court is sought pursuant to the provisions of Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

On February 18, 1981, Petitioner filed a Petition for Habeas Corpus Relief, state court convictions, in the United States District Court for the District of Arizona. The petition challenged only appellant's sentence: death by execution; and principally raised an equal protection argument to the actions of the Arizona courts in excepting only appellant's death sentence from an otherwise universal state-recognized standard of due process of law denying mandated sentences upon improperly alleged/or proven prior convictions. Petitioner's resort to the federal jurisdiction had been necessitated by the Arizona Supreme Court's refusal to review the post-conviction relief petition filed by Petitioner on April 22, 1980 specifically raising this issue in detail, a copy of the Supreme Court's minute entry of September 4, 1980 is attached hereto as Appendix "C".

On June 2, 1981, the District Court dismissed the Petitioner's claim and denied rehearing on June 17, 1981. After obtaining a certificate of probable cause, Petitioner filed his notice of appeal on July 15, 1981, and thereafter limited the appeal to that single issue.

On December 12, 1981, the Arizona Supreme Court rendered its opinion in State v. Ortiz, ___ Ariz. ___, 639 P.2d 1020 (1981). On the morning of oral argument, February 5, 1982, the State of Arizona first suggested that such subsequent state decision was so supportive of Petitioner's claim that the Arizona courts might now choose to address Petitioner's issue, then before the Ninth Circuit. A written motion was filed on March 12, 1982, and despite Petitioner's objection, was granted by the court on June 2, 1982, and reconsideration denied on June 28, 1982.

REASON FOR GRANTING THE WRIT

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WAS WRONG IN ABDICATING THEIR APPELLATE JURISDICTION AND ORDERING THE DISTRICT COURT TO REQUIRE PETITIONER TO AGAIN SUBMIT HIS SINGLE CONSTITUTIONAL CHALLENGE TO THE ARIZONA STATE COURTS.

The doctrine of exhaustion of state remedies "... provides a simple and clear instruction to potential litigants: Before you bring any claim to federal court, be sure that you have first taken each one to state court," Rose v. Lundy, ___ U.S. ___, ___ SCT ___, ___ L.Ed.2d ___ (1982). This, your Petitioner has done. So thoroughly had your Petitioner exhausted state remedies, that Respondent had heretofore stipulated to such exhaustion of state remedies, see Appendix "D".

Current authorities of this Court are unanimous in refusing to apply the doctrine of exhaustion of state remedies to justify abdication of federal jurisdiction, even

where subsequent state court decisions, directly on point, affirm the constitutional position of the habeas corpus petitioner. In Francisco v. Gathright, 419 U.S. 59 (1974), this Court reaffirmed its holding in Roberts v. LaVallee, 389 U.S. 40 (1967), by stating:

> "Petitioner presents two contentions. He first contends that the District Court and the Court of Appeals were wrong in requiring him to resubmit his constitutional attack on the Virginia statute to the state courts. We agree with Petitioner on this point, since we believe that the proper disposition of his claim of statutory invalidity is controlled by Roberts v. LaVallee, 389 U.S. 40 (1967). In Roberts, the petitioner was denied a transcript of his preliminary hearing because he was unable to pay the fee required under New York law. When his equal protection challenge to the New York statute was rejected on direct appeal, he sought habeas relief in federal court. After the United States District Court denied the writ, in another case, the New York Court of Appeals found the statute unconstitutional under both the federal and state constitutions. The Court of Appeals for the Second Circuit dismissed the petition in order to permit Roberts to apply to the state court for relief under the intervening state court decision. This court reverses saying:
>
> > 'Petitioner has already thoroughly exhausted his state remedies, as the Court of Appeals recognized. Still more state litigation would be both unnecessarily time consuming and otherwise burdensome. This is not a case in which there is any substantial state interest in ruling once again on petitioner's case. Id at 43.'
>
> The only distinction between the present case and Roberts is that here the intervening state court decision came down before petitioner filed his petition for habeas relief in federal court, whereas in Roberts, the state decision issued after the

habeas petition had been acted upon by the district court. This distinction does not alter the result as to the exhaustion requirement. In both cases, the state court had a full opportunity to determine the federal constitutional issue before resort was made to a federal forum, and the policy served by the exhaustion requirement would not be furthered by resubmission of the claims to the state courts. Roberts, supra; Brown v. Allen, 344 U.S. 443, 447-450 (1953); Picard v. Connor, 404 U.S. 270, 275 (1971)."

The doctrine of exhaustion of state remedies is a shield whose necessity can be found in the basic concepts of our nation's federalism, the equality of sovereigns. Any application of such doctrine, which grants to state courts the power, by their subsequent determination of issues in unrelated cases, to arbitrarily interdict the orderly handling of litigation within the federal court system fosters not that respected equality, but disruption of one sovereign's judiciary and subjects the other to repetitive litigation.

CONCLUSION

Upon the foregoing, your Petitioner, LARRY EUGENE EVANS, respectfully requests that a Writ of Certiorari issue to review the orders of the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 30th day of July, 1982.

George M. Sterling Jr.
GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007

Randall J. Kries
RANDALL J. KRIES
2715 N. 3rd St., Ste. 100
Phoenix, Arizona 85004

Attorneys for Petitioner

FILED

JUN 02 1982

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY EUGENE EVANS, Petitioner-Appellant, vs. ELLIS C. MacDOUGALL, Director of Arizona Department of Corrections, and ROBERT ZORN, Warden of Cell Block 6, Arizona State Prison, Florence, Arizona, Respondents-Appellees, and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA, Additional Respondent-Appellee.	No. 81-5603 D.C. No. CIV. 81-170 PHX. (CLH) ORDER REMANDING AND DISMISSING APPEAL

Appeal from the United State District Court
for the District of Arizona

Charles L. Hardy, District Judge, Presiding

Argued and submitted February 5, 1982

Before: CHAMBERS, GOODWIN and TANG, Circuit Judges.

We grant the motion of the State of Arizona for remand of this case to permit the exhaustion of remedies as to the issue of possible failure to give notice of intent to seek the death penalty (State v. Ortiz, ____ Ariz. ____, 639 P.2d 1020 (1981)).

The case is remanded to the district court for further proceedings consistent with Rose v. Lundy, No. 80-846, 50 U.S.L.W. 4272 (March 3, 1982).

The appeal is dismissed without prejudice to the raising of the issues in a subsequent appeal. In case a new appeal is taken, either party may notify the Clerk to transfer the briefs and records of this case to that new appeal.

EXHIBIT A

A TRUE COPY
ATTEST JUL 7 - 1982
PHILLIP B. WINBERRY
Clerk of Court
by: Cecelia Tagle
Deputy Clerk

FILED
JUN 28 1982
PHILLIP B. WHEELERY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LARRY EUGENE EVANS, Petitioner-Appellant, vs. ELLIS C. MacDOUGALL, et al., Respondent-Appellee, and THE ATTORNEY GENERAL OF THE STATE OF ARIZONA, Attitional Respondent-Appellee.	No. 81-5603 ORDER DENYING PETITION FOR REHEARING

Before: CHAMBERS, GOODWIN and TANG, Circuit Judges.

The petition for rehearing is denied.

EXIBIT B

MARYANN HOPKINS-YOUNG
CLERK

Supreme Court

STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
Phoenix 85007

RECEIVED SEP 9 1980

PHONE
255-4536

CORRECTED COPY

September 5, 1980

STATE OF ARIZONA,

Appellee,

vs.

LARRY EUGENE EVANS,

Appellant.

Supreme Court
No. 3721-3-PC

Maricopa County
No. CR-92586

The following action was taken by the Supreme Court of the State of Arizona on September 4, 1980 in regard to the above-entitled cause:

"ORDERED: Petition for Review - DENIED

FURTHER ORDERED: Request for Oral Argument - DENIED."

MARYANN HOPKINS-YOUNG, Clerk

By Linda J Quintana
Deputy Clerk

TO:
George M. Sterling, Jr., Esq., 1101 West McDowell Road, Phoenix, Arizona 85007
Robert K. Corbin, Attorney General, 200 State Capitol Building, West Wing, Phoenix, Arizona 85007 Attn: Crane McClennen
Charles F. Hyder, Maricopa County Attorney, 101 West Jefferson, Phoenix, Arizona 85003
Hon William P French, Judge, Maricopa County Superior Court, 201 West
ix, Arizona 85003
, Arizona State Prison, Box B-36165, Florence, Arizona

EXIBIT C

Clerk, Maricopa County Superior Court, 201 West Jefferson,
a 85003 (Certified Copy)

GEORGE M. STERLING, JR.
ATTORNEY AT LAW

1101 WEST McDOWELL ROAD
PHOENIX, ARIZONA 85007
602-257-0395

ATTORNEY FOR: Petitioner

EXIBIT D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LARRY EUGENE EVANS, Petitioner, vs. ELLIS C. MacDOUGALL, Director of Arizona Department of Corrections, et al., Respondents.	NO. CIV-81-170-PHX-CLH STIPULATION OF PARTIES CONCERNING EXHAUSTION OF STATE REMEDIES

COMES NOW the Petitioner, LARRY EUGENE EVANS, by and through his attorney of record, George M. Sterling, Jr., and and the Respondents ELLIS C. MacDOUGALL, et al, by and through their attorney, CRANE McCLENNEN, and hereby stipulate and agree as follows:

1. That as to the first issue raised in the Petition for Habeas Corpus relief filed by the Petitioner, LARRY EUGENE EVANS, the record in the State court (full copies provided to this Court) reflect that in 1980 the Petitioner, LARRY EUGENE EVANS, through his counsel, did file a Petition for Post-Conviction Relief which was heard by The Honorable Judge French, as was the Motion for Rehearing; that a Petition for Review was filed in such action and that prior to the action of the Court of Appeals the Supreme Court took jurisdiction of such Petition for Review and denied the same. A copy of such Minute Entry of the Supreme Court of Arizona is attached hereto to be made part of the record.

2. As to the second issue raised by Petitioner in his Petition for Habeas Corpus, the parties stipulate that in his Opening Brief filed for his first Appeal, Petitioner argued that the facts did not support the finding by the trial court that the previous California conviction was a crime of violence. The main thrust of his argument was that because the conviction was only for attempted robbery, the record did not show that Petitioner actually used force or instill fear in anyone. Petitioner did note several times that the Abstract of Judgment showed that he was not armed. Petitioner, therefore, has exhausted his State remedies on issue two of his Petition. (Quoted verbatim from Defendant's Motion to Dismiss heretofore filed with this Court).

SO STIPULATED and AGREED by the parties this 16th day of April, 1981.

George M. Sterling, Jr.

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, AZ 85007
Attorney for Petitioner Larry Eugene Evans

ROBERT K. CORBIN
Attorney General

Crane McClennen

Crane McClennen
Assistant Attorney General
Attorneys for Respondents

82 5183

RECEIVED
AUG 5 1982
OFFICE OF THE CLERK
SUPREME COURT

IN THE SUPREME COURT OF THE UNITED STATES

LARRY EUGENE EVANS, Petitioner,

vs.

ELLIS C. MacDOUGALL, et al., Respondents,

and

82 5183

THE ATTORNEY GENERAL OF THE STATE OF ARIZONA, Additional Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, LARRY EUGENE EVANS, by and through his attorney undersigned, prays leave of this Court to file the attached petition for writ of certiorari without the prepayment of costs and to proceed in forma pauperis. Petitioner has been previously granted leave to so proceed in both the U. S. District Court and the U. S. Court of Appeals for the Ninth Circuit. In addition, your petitioner, in a separate action before this Court, see Larry Eugene Evans vs. Arizona, No. 79-6752, has by order of this Court been granted leave to proceed in forma pauperis.

RESPECTFULLY SUBMITTED this 30th day of July, 1982.

George M. Sterling, Jr.

GEORGE M. STERLING, JR.
1101 West McDowell Road
Phoenix, Arizona 85007
Counsel for Petitioner

AFFIDAVIT

I, LARRY EUGENE EVANS, being first duly sworn upon my oath depose and state that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since 1976, when I was incarcerated by the State of Arizona as a prisoner of Cell Block No. 6, Arizona State Prison, (death row).
2. That within the last twelve months I have not received any income from any business, profession, or self-employment, nor do I receive any interest, dividends, or other source of income.
3. That I have no checking nor savings account, and the only cash with which I am possessed is that which is within my prison account, which is of a minimal amount.
4. That I own no real estate, stocks, bonds, notes, automobiles, or other property of any value.
5. That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

Larry Eugene Evans

LARRY EUGENE EVANS

STATE OF ARIZONA)
) SS.
County of Maricopa)

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1982.

_____
Notary Public

My Commission Expires:

_____

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SUPREME COURT, U.S.

NO. 82-5183

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY EUGENE EVANS,

PETITIONER,

-vs-

ELLIS C. MacDOUGALL, Director of Arizona Department of Corrections, and ROBERT ZORN, Warden of Cell Block Six, Arizona State Prison, Florence, Arizona,

RESPONDENTS,

and

THE ATTORNEY GENERAL OF THE STATE OF ARIZONA,

ADDITIONAL RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

GREG A. McCARTHY
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Telephone: (602)255-4686

Attorneys for RESPONDENTS

QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit Court of Appeals properly remand this case to the state courts to allow petitioner to exhaust his state remedies on the issue whether he received fair notice with regard to the state's seeking the death penalty?

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STATEMENT OF THE CASE

Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Arizona, alleging in essence that the State of Arizona failed to give him fair notice with regard to its intent to seek the death penalty. The district court denied petitioner's petition. Petitioner then appealed to the Ninth Circuit Court of Appeals. While this appeal was pending, the Arizona Supreme Court handed down its decision in State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1982), which decision specified the due-process fair-notice requirements that the state must give a defendant with regard to its seeking the death penalty. Because the record presently before the circuit court does not reflect whether these requirements were satisfied in this case, the state moved to remand this case to the state courts to permit the exhaustion of state remedies on this point. The circuit court granted this motion. Petitioner in the instant action seeks to challenge this decision of the circuit court.

ARGUMENT

THE CIRCUIT COURT PROPERLY REMANDED THIS CASE TO THE STATE COURTS TO PERMIT THE EXHAUSTION OF STATE REMEDIES.

Petitioner's contention must be that the Ninth Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

Rule 17(1)(a), Rules of the Supreme Court. Respondent disagrees that this standard has been satisfied. It is respondent's position that the court of appeals acted properly in remanding this case to the state courts to allow petitioner to exhaust his state remedies on the issue whether he had sufficient due-process notice under State v. Ortiz, 131 Ariz. 195, 639 P.2d 1020 (1982).

Petitioner's contention has been that the state was obliged to allege before trial the aggravating circumstance upon which it would be seeking the death penalty, and further that it was obliged to prove this aggravating circumstance to the jury. Petitioner has argued that both due process and equal protection required this result. It is clear that petitioner has exhausted his state remedies regarding this specific contention.

However, there has been no exhaustion of state remedies on the closely related contention whether under State v. Ortiz, supra, petitioner received fair notice. In State v. Ortiz, the Arizona Supreme Court stated:

> [D]ue process in an A.R.S. § 13-703 hearing requires of the prosecution three duties: (1) disclosure of the aggravating circumstances the state will seek to prove; (2) disclosure of the evidence the state will use; and (3) disclosure sufficiently in advance of the hearing that the defendant will have a reasonable opportunity to prepare rebuttal.

131 Ariz. at 207, 639 P.2d at 1032. State v. Ortiz was handed down while petitioner's appeal was pending in the circuit court. The record before the circuit court did not

reflect whether these due-process fair-notice requirments of State v. Ortiz had been met in this case. Thus, there is a need to remand this case to the state courts to determine whether these requirements were satisfied.

Petitioner has cited Francisco v. Gathright, 419 U.S. 59 (1974), and Roberts v. LaValle, 389 U.S. 40 (1967), in support of his argument that the circuit court should not have remanded this case to the state courts. But these two cases are easily distinguishable from our case. In both of the cases cited by petitioner, there simply was no need to remand the case to the state courts. In both cases, the circuit court was faced with a purely legal question whether a state statute was unconstitutional. The circuit court could itself pass judgment on the statute despite a previous state court decision holding it to be unconstitutional. In the instant case, there is a definite need for a remand of the case to the state courts. As the instant case now stands, there is no factual predicate in the record sufficient for determining whether petitioner had fair notice with respect to the state's seeking the death penalty. Also, State v. Ortiz is not necessarily supportive of petitioner's claim, since it may well be that the fair-notice requirements specified in that case were met in our case.

CONCLUSION

Because the circuit court properly remanded this case to the state courts to allow for exhaustion of state remedies regarding one of the issues presented, this Court should deny the petition for a writ of habeas corpus.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

William J. Schafer III

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

Greg McCarthy

GREG A. McCARTHY
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Attorneys for RESPONDENTS

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GREG A. McCARTHY, being first duly sworn upon oath, deposes and says:

That he served appellant in the foregoing case by forwarding one (1) copy of RESPONSE TO PETITION FOR WRIT OF CERTIORARI; and also served the attorneys for the appellant in the foregoing case by forwarding one (2) copies of RESPONSE TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

GEORGE M. STERLING, JR.
1101 W. McDowell Road
Phoenix, Arizona 85007

LARRY EUGENE EVANS
Box B-36165
Arizona State Prison
Florence, Arizona 85232

RANDALL J. KRIES
2715 N. 3rd Street, Ste. 100
Phoenix, Arizona 85004

this 27th day of August, 1982.

GMcCarthy
GREG A. McCARTHY

SUBSCRIBED AND SWORN to before me this 27th day of August, 1982.

Erica L. Pike
NOTARY PUBLIC

My Commission Expires:
October 28, 1985

HC 4-261
0443D clp